

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 384

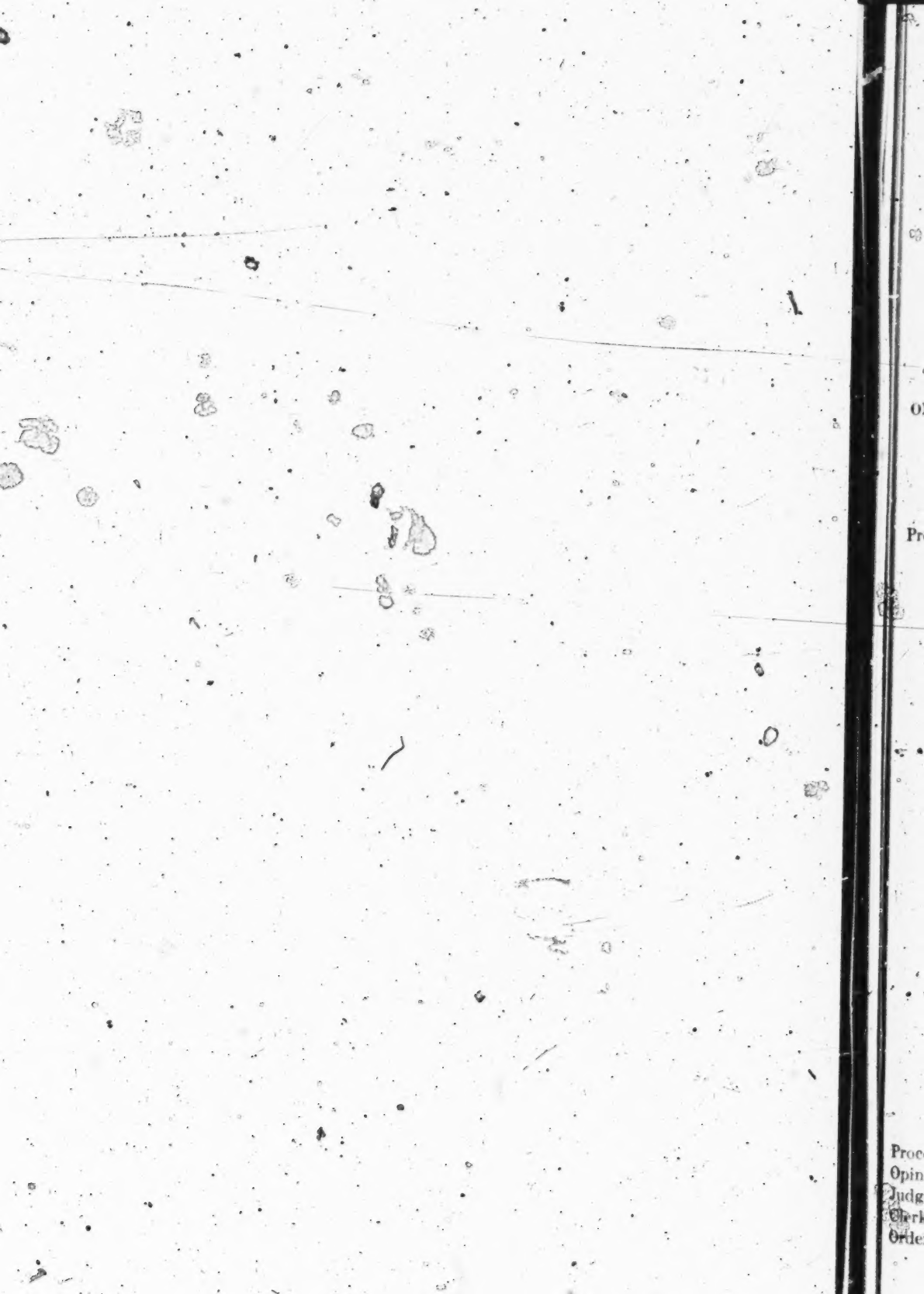
GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

vs.

MEREDITH WOOD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1939
CERTIORARI GRANTED NOVEMBER 6, 1939



Of

Pro

Proc
Opin
Judg
Clerk
Order

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

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GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

vs.

MEREDITH WOOD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT

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Before United States Board of Tax Appeals

Docket No. 88426

MEREDITH WOOD, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearances: For Taxpayer: Geo. M. Wolfson, Esq., Ralph A. McClelland, Cuthbert B. Caton. For Comm'r: Arthur Carnduff, Esq.

1937

Mar. 15—Petition received and filed. Taxpayer notified. (Fee paid.)

Mar. 15—Copy of petition served on General Counsel.

Mar. 26—Notice of appearance of Geo. M. Wolfson as counsel filed.

Mar. 26—Notice of appearance of Ralph A. McClelland as counsel filed.

May 8—Answer filed by General Counsel.

May 11—Copy of answer served on taxpayer.

Nov. 11—Hearing set Jan. 10, 1938.

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Jan. 10—Hearing had before Mr. Tyson on merits. Submitted. Joint stipulation of facts filed. Petitioner's opening brief filed. Respondent's reply 30 days from hearing. Petitioner's brief due 15 days after respondent's reply.

Jan. 12—Copy of brief filed at hearing served on General Counsel.

Jan. 21—Transcript of hearing of Jan. 10, 1938, filed.

Feb. 2—Brief filed by General Counsel.

Feb. 8—Motion for leave to introduce additional evidence and if member fails to grant this motion, without further argument, to grant petitioner leave to argue orally in support of motion filed by taxpayer.

Feb. 16—Reply brief filed by taxpayer. 2/16/38 copy served on General Counsel.

Feb. 16—Hearing set 3/23/38 on above motion.

Feb. 17—Copy of motion and notice of hearing served on General Counsel.

Mar. 4—Stipulation of facts filed.

Mar. 23—Entry of appearance of Cuthbert B. Caton as counsel for taxpayer filed.

Mar. 23—Motion of February 8, 1938, granted.

Mar. 23—Hearing had before Mr. Tyson; petitioner's motion for leave to introduce additional evidence—granted.

1938

- June 17—Opinion promulgated, Mr. Tyson, Div. 1. Decision will be entered under Rule 50.
- July 12—Motion for reconsideration of opinion by the full Board filed by General Counsel.
- July 15—Order that respondent's motion for review by the entire Board is denied and respondent is granted an exception to the denial of his said motion, entered.
- July 28—Computation of deficiency filed by taxpayer.
- July 30—Hearing set Aug. 17, 1938, on settlement.
- Aug. 1—Copy of computation and notice of hearing served on General Counsel.
- Aug. 5—Computation of deficiency filed by General Counsel. 8/9/38 copy served.
- Aug. 13—Acquiescence to respondent's computation filed by taxpayer. 8/15/38 copy served on General Counsel.
- Aug. 18—Decision entered, John A. Tyson, Div. 1.
- Nov. 8—Petition for review by United States Circuit Court of Appeals, Second Circuit, with assignments of error filed by General Counsel.
- Nov. 17—Proof of service filed by General Counsel. Taxpayer.
- Nov. 17—Proof of service filed by General Counsel with affidavit attached (attorney for taxpayer).
- Dec. 27—Motion for extension of time to Feb. 7, 1939, to complete and transmit record filed by General Counsel.
- Dec. 27—Order enlarging time to Feb. 7, 1939, to complete and transmit record, entered.

1939

- Jan. 21—Agreed praecipe for record filed by General Counsel, with proof of service thereon.

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Before United States Board of Tax Appeals

Docket No. 88426

Petition

The above-named petitioner hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter dated December 21, 1936, and as a basis of this appeal submits the following:

I. The petitioner herein is an individual and a citizen of the United States, having his present residence at Underhill Road, Scarsdale, Town of Greenburgh, Westchester County, State of New York.

II. That on or after December 21, 1936, there was mailed to Meredith Wood, the petitioner herein, a ninety-day letter proposing a deficiency in income tax for the year 1934 in the amount of \$1,228.23. A true copy of the deficiency letter is attached hereto and marked Exhibit A. The amount of the deficiency in controversy is \$1,224.03.

ASSIGNMENTS OF ERROR

III. The determination of the Commissioner of Internal Revenue, as set forth in said deficiency letter, is based upon the following errors:

(a) The Commissioner erred in including in the petitioner's income for the year 1934 the sum of \$8,750 paid as dividends on 25 shares of the capital stock of Book-of-the-Month Club, Inc., which said stock was held in trust by the petitioner as Trustee under a Declaration of Trust dated April 8, 1931, as modified by Supplementary Declaration of Trust dated March 25, 1932, wherein your petitioner was the settlor and trustee and Helen Martin Wood, the beneficiary; the income from said trust agreement having been included in the return of said Helen Martin Wood, the wife of the petitioner, for the taxable year 1934.

(b) The Commissioner erred in his determination that the said Declaration of Trust dated April 8, 1931, as modified by Supplementary Declaration of Trust dated March 25, 1932, was a revocable trust.

(c) The Commissioner erred in construing Article 166-1 of Regulation 86, as amended by Treasury Decision 4629 or any other regulation or law, as imposing the above mentioned tax liability upon your petitioner and as causing the income from the above mentioned trust for the year 1934 in the amount of \$8,750 to be included as part of the income of your petitioner, as there is no basis in the Revenue Act of 1934 for such regulation or construction thereof.

STATEMENT OF FACTS

IV. The facts upon which the petitioner relies as a basis of this appeal are as follows:

1. That heretofore and on or about the 8th day of April, 1931, your petitioner duly executed a Declaration of Trust in which your petitioner was the Settlor and Trustee and Helen Martin Wood was the Beneficiary, a copy of which Declaration of Trust is annexed hereto, made a part hereof and marked Exhibit B, and simultaneously therewith caused to be duly transferred to petitioner, as Trustee, 25 shares of the capital stock of Book-of-the-Month Club, Inc., which your petitioner, as Trustee, at all the times hereinafter mentioned and until the 8th day of April, 1936, held and continued to hold as the sole corpus of said trust under and pursuant to the terms of said Declaration of Trust.

2. The said Declaration of Trust dated April 8, 1931, provided that "This trust shall continue in effect until (a) the expiration of three years from the date of this instrument, or (b) the death of the Settlor, or (c) the death of Helen Martin Wood, whichever event shall first happen, and shall thereupon terminate.

"On the termination of the trust by reason of the expiration of said three years, or the death of Helen Martin Wood, all property then held in trust hereunder, shall be paid, delivered and transferred to

the Settlor to be his own property free of trust. On the termination of the trust by reason of the death of the Settlor, the said trust property shall be paid, delivered and transferred to the executors of the Settlor to be disposed of as part of his estate under his Last Will and Testament."

3. That thereafter and on or about the 25th day of March, 1932, your petitioner duly executed a Supplementary Declaration of Trust, bearing even date, which modified the above mentioned provision (a) of said trust agreement by extending the period of the trust from three years to five years, a copy of which Supplementary Declaration of Trust is annexed hereto, made a part hereof and marked Exhibit C.

4. That your petitioner reserved no right of revocation or modification of said trust as supplemented and said trust was irrevocable.

5. That said trust agreement as supplemented was at all the times between April 8, 1931, and April 8, 1936, and particularly during the year 1934, in full force and effect.

6. That on and after the 8th day of April 1931, and particularly during the year 1934, all dividends paid on said 25 shares of the capital stock of Book-of-the-Month Club, Inc., were received by your petitioner as such Trustee and deposited in a special bank account in the name of "Meredith Wood, Trustee."

7. That on and after the 8th day of April 1931, and particularly during the year 1934, all of the income from said trust was paid to the beneficiary thereof, Helen Martin Wood, by check drawn to her order.

8. That no dividends on said 25 shares of capital stock of Book-of-the-Month Club, Inc., were received by your petitioner individually during the year 1934.

9. That on and after the 8th day of April 1931, and particularly during the year 1934, all dividends received by your petitioner as such Trustee on account of said 25 shares of capital stock of Book-of-the-Month Club, Inc., in the amount of \$8,750 were paid to said Helen Martin Wood, the beneficiary of said trust, as the income therefrom; and the income so received by said Helen Martin Wood in the said sum of \$8,750, as your petitioner is informed and believes, was included as income in the income tax returns filed by said Helen Martin Wood for the year 1934.

10. That your petitioner duly filed his income tax return for the year 1934 with the Collector of Internal Revenue at the Custom House, Borough of Manhattan, New York, N. Y., and paid the tax shown to be due thereon in the amount of \$1,278.96; said return did not include the said dividends paid on said 25 shares of capital stock of Book-of-the-Month Club, Inc., during the year 1934 nor the income from said trust.

11. The respondent has proposed to increase the income of your petitioner for the year 1934 by the sum of \$8,750, representing dividends paid during that year on 25 shares of capital stock of Book-of-the-Month Club, Inc., which said shares were held by your petitioner as Trustee in the manner aforesaid and the dividends thereon were paid

to your petitioner only as such Trustee and thereafter paid by him as such Trustee to the beneficiary, Helen Martin Wood, and included within her income tax return for that year. Your petitioner heretofore had a hearing with respect to the foregoing before C. B. Allen, Esq., Internal Revenue Agent in Charge, 341 Ninth Avenue, New York, N. Y., on August 17, 1936, and has heretofore duly filed a protest with respect thereto with said Internal Revenue Agent in Charge as well as with the Commissioner of Internal Revenue at Washington, D. C.

PRAYER FOR RELIEF

V. Wherefore, petitioner prays that this Board may hear and determine this appeal and adjudge that the petitioner should not have included in his income for the year 1934 the sum of \$8,750, representing dividends declared on 25 shares of the capital stock of Book-of-the-Month Club, Inc., but that such dividends were properly included in the income of Helen Martin Wood, the wife of your petitioner; that the Declaration of Trust dated April 8, 1931, as modified March 25, 1932, is an irrevocable deed of trust, and that all income therefrom should not be included within the income of your petitioner but should be included in the income of said Helen Martin Wood; that Article 166-1 of Regulation 86, as amended by Treasury Decision 4629, is invalid in so far as it is construed as imposing the above mentioned tax liability upon your petitioner and as causing the income from the above mentioned trust for the year 1934 in the amount of \$8,750 to be included as part of the income of your petitioner; that said Regulation as amended by said Treasury Decision is invalid and there is no basis in the Revenue Act of 1934 therefore.

Petitioner further prays for such other and further relief as may seem just and equitable to this Board.

(Sgd.) MEREDITH WOOD,
 GEORGE M. WOLFSON,
 RALPH A. McCLELLAND,
 Attorneys for Taxpayer,
 165 Broadway, New York, N. Y.

Duly sworn to by Meredith Wood; jurat omitted in printing.

Exhibit A annexed to petition

TREASURY DEPARTMENT,
 OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
 Washington, Dec. 21, 1936.

Address reply to Commissioner of Internal Revenue.

Mr. MEREDITH WOOD,

Underhill Road, Scarsdale, New York.

SIR: You are advised that the determination of your income-tax liability for the taxable year 1934 discloses a deficiency of \$1,228.23 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:Cl:P:7. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:

Statement;
Form 870.

STATEMENT

IT:A:2.
MHS-90D.

In re: Mr. Meredith Wood, Underhill Road, Scarsdale, New York.
Income-Tax Liability

Year, 1934; Income Tax Liability, \$2,507.19; Income Tax Assessed, \$1,278.96; Deficiency, \$1,228.23.

The deficiency shown herein is based upon the report dated June 20, 1936, prepared by Revenue Auditor G. C. Fogerty, a copy of which was transmitted to you under date of August 7, 1936.

Careful consideration has been accorded your protest dated August 17, 1936, in connection with the findings of the examining officer and the information submitted at a conference held in the office of the Internal Revenue agent in charge.

The adjustments are as follows:

| | |
|---------------------|-------------|
| Net income reported | \$18,473.30 |
| Plus: | |
| 1 Dividends | 8,750.00 |
| 2 Error in addition | 20.00 |
| Total income | \$27,243.30 |

EXPLANATION OF CHANGES

| | |
|----------------------|------------|
| 1 Dividends reported | \$1,172.69 |
| Dividends corrected | 9,922.69 |
| Restored to income | \$8,750.00 |

Dividends of \$8,750.00 paid on stock held in a revocable trust created by you for the benefit of your wife has been eliminated from the return filed by your wife, Mrs. Helen M. Wood, and included in your return.

2. An error of \$20.00 was made in determining the total of deductions claimed, the correct total being \$1,355.69 instead of \$1,375.69.

The items listed as deductions are as follows:

| | |
|------------------|------------|
| 14 Interest paid | \$3.15 |
| Taxes paid | 1,143.74 |
| Contributions | 188.80 |
| Other deductions | 20.00 |
| Total | \$1,355.69 |

COMPUTATION OF TAX

| | |
|----------------------------------------------------|-------------|
| Net income adjusted | \$27,243.30 |
| Less: Personal exemption and credit for dependents | 2,766.65 |
| Surtax income | \$24,476.64 |
| Less: | |
| Dividends | \$9,022.60 |
| Earned income credit (10% of \$14,000.00) | 1,400.00 |
| Income subject to normal tax | \$13,153.95 |
| Surtax on \$24,476.64 | 1,981.03 |
| Normal tax at 4% on \$13,153.95 | 526.16 |
| Tax liability | \$2,507.19 |
| Tax assessed, account # 220063 | 1,278.96 |
| Deficiency | \$1,228.23 |

15. In reply to Bureau letter dated November 18, 1936, wherein the recommendations of the internal revenue agent in charge, 341 Ninth Avenue, New York, New York, were approved, your representative stated that the protest submitted therewith contained no new facts or arguments, that you did not desire a conference in Washington, but that you wished to go on record as still protesting the deficiency; therefore, this final notice of deficiency is being issued.

A copy of this letter has been mailed to your representative, Mr. Ralph A. McClelland, % Rounds, Dillingham, Mead and Neagle, 165 Broadway, New York, New York, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

16 Before United States Board of Tax Appeals

Docket No. 88426

Answer

The Commissioner of Internal Revenue, by his attorney, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

- I. Admits the allegations contained in paragraph I of the petition.
- II. Admits the allegations contained in paragraph II of the petition.

III. (a), (b), and (c). Denies that the Commissioner's determination is erroneous as alleged in subparagraphs (a), (b), and (c) of paragraph III of the petition.

IV. (1) Admits the allegations of fact contained in subparagraph (1) of paragraph IV of the petition, except that it is denied, for lack of information, that Exhibit B attached to the petition is a copy of said declaration of trust.

(2) Admits the allegations contained in subparagraph (2) of paragraph IV of the petition.

(3) Admits the allegations contained in subparagraph (3) of paragraph IV of the petition but, for lack of information, denies that Exhibit C attached to the petition is a copy of said supplementary declaration of trust.

17 IV. (4) Denies the allegations contained in subparagraph (4) of paragraph IV of the petition.

(5) Admits that said trust agreement as supplemented was from April 8, 1931, to and including the year 1934 in full force and effect; for lack of information, denies the remaining allegations contained in subparagraph (5) of paragraph IV of the petition.

(6) Admits that on and after the 8th day of April 1931, and particularly during the year 1934, all dividends paid on said 25 shares of the capital stock of Book-of-the-Month Club, Inc., were received by petitioner, but denies, for lack of information, the remaining allegations of fact contained in subparagraph (6) of paragraph IV of the petition.

(7) Denies, for lack of information, the allegations contained in subparagraph (7) of paragraph IV of the petition.

(8) Denies, for lack of information, the allegations contained in subparagraph (8) of paragraph IV of the petition.

(9) Denies, for lack of information, the allegations contained in subparagraph (9) of paragraph IV of the petition except that it is admitted that the sum of \$8,750.00 was returned by Helen M. Wood in her income-tax return for the year 1934.

(10) Admits that petitioner filed his income tax return for the year 1934 with the Collector of Internal Revenue at the Custom House, Borough of Manhattan, New York, New York; and admits that said return did not include the said dividends paid on said 25 shares of capital stock of Book-of-the-Month Club, Inc., during the year 1934

18 nor the income from said trust; denies the remaining allegations of fact contained in subparagraph (10) of paragraph IV of the petition.

IV (11) Admits that respondent has added said sum of \$8,750.00 to petitioner's income as returned for the year 1934, but, being without sufficient knowledge in respect of the payment of said dividends, denies that they were in fact paid to petitioner only as trustee and thereafter paid by him as such trustee to Helen Martin Wood. Admits that said Helen Martin Wood included said sum of \$8,750.00 in her 1934 income tax return. Denies all other allegations of fact contained in subparagraph (11) of paragraph IV of the petition.

V. Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that taxpayer's appeal be denied.

(Sgd.) MORRISON SHAFROTH,
Morrison Shafroth,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

CHESTER A. OWINN,

CHARLES E. LOWERY,

Special Attorneys,

Bureau of Internal Revenue.

CEL-mcm 5-7-37.

Before United States Board of Tax Appeals

Docket No. 88,426

Motion for leave to introduce additional evidence

Now comes the Petitioner by his attorney, George M. Wolfson, and respectfully moves this honorable Board for leave to introduce into evidence in this proceeding (a) a certain agreement made the 27th day of January 1931 between Harry Scherman and Meredith Wood, said agreement being referred to in the last paragraph of the Declaration of Trust attached to the petition herein as Exhibit "B", and (b) a certain agreement dated the 27th day of January 1931 between Robert K. Haas and Merle S. Haas and Harry Scherman and Bernardine K. Scherman and Meredith Wood, said agreement being referred to in the first-mentioned agreement of January 27, 1931, and that for such limited purpose the hearing herein shall be deemed to be reopened or a further hearing granted. A copy of said first mentioned agreement of January 27, 1931 is hereto attached as Exhibit 1, and a copy of said second-mentioned agreement is hereto attached as Exhibit 2.

In support of this motion it is stated that counsel for the petitioner inadvertently omitted to introduce said agreements into evidence at the hearing herein held on January 10, 1938, for the reason that no reference thereto was made in the deficiency letter of the Commissioner of Internal Revenue attached to the petition herein as Exhibit A, nor was any reference thereto made in the answer of the Respondent to the petition herein, nor was any reference thereto made by counsel for Respondent at the hearing herein held on January 10, 1938; nor in the oral argument which was had at the conclusion of that hearing. Petitioner did not know or believe that Respondent relied on said agreements for any purpose.

For the first time in this proceeding reference to said agreements was made in the brief of Respondent filed herein on February 2, 1938.

In the statement of facts in said brief, reference is made to the first mentioned agreement and the statement is made (page 9): "In so far as the agreement with Scherman was concerned, the stock was to be held and disposed of 'as though said stock were held and owned by the Settlor as an individual.' This provision was manifestly for Petitioner's benefit—so that he might not violate the terms of the existing agreement with Scherman."

Again in Respondent's brief (p. 15), the argument is made that the burden was on the Petitioner to show that Harry Scherman did not have the power to revest title to the stock in the grantor and that Harry Scherman did have an adverse interest in the disposition of the corpus or income; and Respondent further argues (p. 16) that the reservation as to Scherman was for Petitioner's benefit and that if the trust was an absolute divesting of title the agreement with Scherman could not have been carried out.

Petitioner contends that the said agreement with Scherman referred to in Respondent's brief, being the above first-mentioned agreement of January 27, 1931, does not in any way bear upon or adversely affect Petitioner's contentions in this proceeding and Petitioner's argument in support of that contention will appear in Petitioner's reply brief, but Petitioner, being surprised by the reference to said agreement in

Respondent's brief, deems it necessary in the interest of the
21 Petitioner that this honorable Board have before it in evidence the said first-mentioned agreement of January 27, 1931, as well as the second-mentioned agreement of the same date referred to in the first-mentioned agreement so that said agreements may not be construed adversely to Petitioner by reason of rules as to presumption of fact or burden of proof.

Petitioner is informed that the correctness of the copies of said two agreements of January 27, 1931, hereto attached is not disputed by counsel for Respondent, and, therefore, Petitioner requests that if this motion be granted, an order be made that the said two agreements hereto attached, marked respectively Exhibits 1 and 2, are deemed to be received in evidence in lieu of production of the originals, with the same effect as if they had been so received at the hearing on January 10, 1938.

Petitioner further respectfully requests that if this honorable Board shall fail to grant this motion without further argument, Petitioner be given the opportunity to argue orally in support of this motion.

Respectfully submitted.

GEORGE M. WOLFSON,

Attorney for Petitioner,

165 Broadway, Borough of Manhattan,

New York City.

Dated February 7th, 1938.

Before United States Board of Tax Appeals

Docket No. 88426. Promulgated June 17, 1938

Opinion

Where petitioner created a trust, naming his wife as beneficiary the income therefrom, but did not reserve any power to revoke the trust and the income could not under the terms of the trust instrument be paid to him or accumulated for his future benefit, and, further, where the trust was not established to discharge a legal obligation of petitioner and he did not control the use of the income, held, that the income of the trust was not taxable to petitioner under sections 166 or 167 of the Revenue Act of 1934.

George M. Wolfson, Esq., and Ralph A. McClelland, Esq., for the petitioner.

Arthur W. Carnduff, Esq., for the respondent.

TYSON: This proceeding seeks redetermination of an income tax deficiency of \$1,228.23 for the year 1934, of which amount \$1,224.03 is controversy.

Petitioner assigns error in the respondent's determination that a certain trust established by petitioner was a revocable trust and that petitioner received as taxable income in 1934 the sum of \$8,750, paid dividends on 25 shares of the capital stock of the Book-of-the-Month Club, Inc., which constituted the corpus of that trust.

The petitioner is an individual and a citizen of the United States, residing at Scarsdale, Town of Greenburgh, New York.

On April 8, 1931, the petitioner executed a declaration of trust, in which he, as the owner of 25 shares of the capital stock of Book-of-the-Month Club, Inc., and as the settlor, declared himself the trustee, "to hold the same in trust, to hold, invest, and reinvest the same, to collect the net income therefrom from the date thereof, and to pay the said net income, as and when received by him, to his wife, Helen Martin Wood, until the termination of this trust." The declaration of trust of April 8, 1931, provided, inter alia, that, "this trust shall continue in effect until (a) the expiration of three years from the date of this instrument, or (b) the death of the settlor, or (c) the death of Helen Martin Wood, whichever event shall first happen, and shall thereupon terminate." Upon termination of the trust the property then held in trust would be transferred and delivered to the settlor to be his own property, except that in case of its termination by his death the property would be transferred and delivered to his executors to be disposed of as part of his estate under his last will and testament. A supplementary declaration of trust, executed by petitioner on March 25, 1932, extended the three-year period for the continuance of the trust to a five-year period on April 8, 1931.

The declarations of trust further provided that the settlor might resign as trustee and appoint a substitute trustee; that, without lia-

bility for loss not arising from willful misconduct, the trustee, whether original or substituted, had the power to retain the 25 shares of stock of the Book-of-the-Month Club, Inc., or to sell the same, or any part thereof, to make any investment or reinvestment of the property or money held in trust, to determine the value of the property, "to determine whether any property or money received or
24 held in trust shall be treated as capital or income, and the mode in which any expense incidental to the execution of the trust is to be borne as between capital and income," and, further, that the trustee "shall at all times hold and dispose of said twenty-five shares of the capital stock of Book-of-the-Month Club, Inc., subject to the provisions and restrictions of a certain agreement in writing made and dated the 27th day of January 1931, between Harry Scherman and the Settlor, to the same extent, as regards said agreement, as though said stock were held and owned by the Settlor as an individual." That agreement of January 27, 1931, placed certain restrictions upon the petitioner's disposition of his shares of stock of the Book-of-the-Month Club, Inc., by requiring that if he desired to dispose of the stock it should be first offered for sale to Scherman, that the certificates for such stock should bear a suitable legend containing reference to the agreement, and that petitioner should not pledge, mortgage, hypothecate, or otherwise encumber any of the shares without the consent of Scherman.

On April 8, 1931, the petitioner transferred 25 shares of stock of the Book-of-the-Month Club, Inc., to himself as trustee under the above-mentioned declaration of trust and at all times thereafter, and until April 8, 1936, the petitioner, as trustee, continued to hold the stock as the sole corpus of that trust.

After April 8, 1931, and particularly during the year 1934, all dividends paid on the 25 shares of stock of the Book-of-the-Month Club, Inc., were received by petitioner as trustee and deposited by him in a special bank account entitled "Meredith Wood, Trustee," and all income from the trust was paid to Helen Martin Wood, the beneficiary, by checks drawn to her order and signed by the petitioner,
25 as trustee, no part of the income ever being distributed to the grantor or accumulated.

All of the dividends received by petitioner as trustee during the year 1934, amounting to \$8,750, were included in the income-tax return filed by Helen Martin Wood for the year 1934.

The petitioner duly filed his income-tax return for the year 1934 with the collector of internal revenue at the Customs House, Borough of Manhattan, New York, New York, and paid the tax, in the sum of \$1,278.96, shown to be due thereon. The petitioner did not include in that return any income from the above-mentioned trust. The respondent has increased petitioner's income for 1934 by the amount of \$8,750, representing the dividends paid during that year on the 25 shares of stock of the Book-of-the-Month Club, Inc., constituting the corpus of the trust.

The petitioner contends that the income from the trust, in the amount of \$8,750 for the year 1934, constituted taxable income of the beneficiary, Helen Martin Wood. The respondent contends that the income from the trust is taxable to the grantor, petitioner, under the provisions of sections 166 and 167 of the Revenue Act of 1934.¹

26 In *United States v. First National Bank of Birmingham*, 74 Fed. (2d) 360, a trust had been created for a period of one year, which terminated during the taxable year 1929, and the Commissioner contended that the income therefrom was taxable to the grantor during 1929 under section 166 of the Revenue Act of 1928, which provided in part: "Where the grantor of a trust has, at any time during the taxable year, * * * the power to revest in himself title to any part of the corpus of the trust, * * * [italics supplied] then the income therefrom shall be included in the income
27 of the grantor. The court held that the trust was not one such as described by section 166 of the 1928 Act, "as the grantor did not have, at any time during the taxable year 1929, or at any other time, * * * the power to revest in himself title to any part of the corpus of the trust." The court further held that the trust instrument granted an irrevocable estate for years and that the income therefrom was subject to the unfettered command of the grantee and was not taxable to the grantor. The principle of law there announced is that where a trust for a period of years terminates by the terms of the trust instrument, with title to the corpus thereupon revesting in the grantor, such termination is not under the exercise, at any time, of a "power to revest" reserved to the grantor either alone or in conjunction with any person not a beneficiary of the trust, within the meaning of section 166 of the 1928 Act. Since the language in section 166 of the Revenue Act of 1934, applicable in the instant case, differs from that in section 166 of the 1928 Act only by the omission of the words "during the taxable year," and since in the *First National Bank of Birmingham* case the trust did terminate

¹ SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus in computing the net income therefrom, then the income of such part of the trust shall be included in computing the net income of the grantor.

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (a), relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question."

during the taxable year there in question, clearly, the principle there announced is applicable in the instant case.

In neither the original nor the supplementary declaration of trust was any power of revocation reserved to the petitioner or anyone else. The trust could be terminated only upon the happening of one of the three events specified in the original and supplementary declarations, viz, the death of the grantor or of the beneficiary, or the termination of a five-year period from April 8, 1931, and petitioner, the grantor, had no control over the happening of such events. The trust constituted the grant of an estate for years and the beneficiary became the owner of an equitable interest in the corpus.

28 Blair v. Commissioner, 300 U. S. 5. Since section 166, supra, deals only with revocable trusts, and since the trust here in question was not, under the terms of the instruments creating it, revocable at any time during the period fixed for its duration, that section is not applicable in the instant case. Phebe Warren McKean Downs, 36 B. T. A. 1129. Cf. William E. Boeing, 37 B. T. A. 178.

The trust here in question was not established to discharge a legal obligation of the grantor or to pay premiums for insurance on the grantor's life. Thus the principles laid down in such cases as Burnet v. Wells, 289 U. S. 679, and Douglas v. Willcuts, 296 U. S. 1, are not applicable here.

The instruments establishing the trust did not provide for the distribution of any income from the trust to the grantor and none was so distributed. Those instruments, in defining the trustee's duties and powers, gave the trustee the power to determine whether any property or money received or held in trust should be treated as capital or income, but, when considered with the instruments as a whole and the construction given them by the parties, such power may not, in our opinion, be construed as a provision for the accumulation of any income from the trust for future distribution to the grantor. The trust instruments specifically provided that the income should be paid to Helen Martin Wood, the beneficiary, as and when received by the trustee, and all the income was in fact so paid to her and none was distributed to the grantor or accumulated. There is no provision in the trust instruments nor any evidence in the record that it was the intention of the grantor that the income, or any part thereof, was to be used in the discharge of petitioner's marital duty to support his wife, the beneficiary of the trust, and it may not be presumed that the petitioner's gift to his wife was to be used to effectuate that purpose. Shanley v. Bowers, 81 Fed. (2d) 43; Henry A. B. Dunning, 36 B. T. A. 1222.

29 While the petitioner, as trustee, had the power to manage the corpus of the trust, the trust instruments made no provision for his control over the use of the income from the trust and there is no evidence of record that he attempted to exercise any such control. The petitioner did not own that income nor did it remain his in substance, for, under the terms of the grant and for the specified period

of time, the beneficiary had the unfettered right to receive and use the income from the trust corpus. *United States v. First National Bank of Birmingham*, *supra*.

In our opinion, section 167, *supra*, is also clearly not applicable in the instant case. Cf. *Henry A. B. Dunning*, *supra*; *Phebe Warren McKean Downs*, *supra*; *Kaplan v. Commissioner*, 66 Fed. (2d) 401; *William E. Boeing*, *supra*; *E. E. Black*, 36 B. T. A. 346. In *Warren H. Corning*, 36 B. T. A. 301, the income of the trust was accumulated and there was reserved to the grantor a vested power to revoke and amend the trust, and that case is thus clearly distinguished from the instant case on the facts. In *William Lea Taylor*, 37 B. T. A. 875, the trust instrument specifically provided for certain accumulations of income and the distribution of corpus and accumulated income to the grantor upon the termination of the trust, and also reserved in the grantor the power to terminate the trust upon the happening of certain events, which clearly distinguishes that case from the instant case on the facts.

The respondent erred in including the \$8,750 income from the trust in question in the petitioner's taxable income for the year 1934.

Decision will be entered under Rule 50.

[SEAL]

30. Before United States Board of Tax Appeals
Washington

Docket No. 88426

Decision

Pursuant to the Opinion of the Board promulgated June 17, 1938, the respondent herein having on August 5, 1938, filed a proposed recomputation and the petitioner having on August 13, 1938, filed an acquiescence therein, now therefore, it is

Ordered and decided: That there is a deficiency in income tax for the year 1934 in the amount of \$2.60.

Entered Aug. 18, 1938.

Enter:

[SEAL]

(Signed) - JOHN A. TYSON, Member.

31. In United States Circuit Court of Appeals for the Second Circuit

B. T. A. No. 88426

Petition for review and assignments of error

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General;

J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue; and John W. Smith, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

Jurisdiction

That the Petitioner on Review is the duly appointed, qualified, and acting Commissioner of Internal Revenue, hereinafter referred to as the Commissioner, appointed and holding his office by authority of the laws of the United States; that the Respondent on Review, Meredith Wood, hereinafter referred to as the taxpayer, is an individual residing on Underhill Road, Scarsdale, New York, is an inhabitant of the judicial circuit of the United States Circuit Court of Appeals for the Second Circuit, and filed a Federal income-tax return, Form 1040, for the calendar year 1934, with the Collector of Internal Revenue for the Third New York District, whose office is within the jurisdiction of this Honorable Court; that the court in which the review of this cause is sought is the United States Circuit Court of Appeals for the Second Circuit.

II

Nature of controversy

The nature of the controversy is as follows:

On April 8, 1931, the taxpayer executed a declaration of trust in which he, as owner of 25 shares of stock of the Book-of-the-Month Club, Inc., granted in trust to himself as trustee the said stock, to hold the same, to collect the income therefrom and pay it to his wife as beneficiary. The declaration provided for the continuance of the trust for three years after the date of the instrument or until death of either spouse within that period. It also provided, upon its termination, that the corpus should be transferred to the grantor or his estate. By supplementary declaration dated March 25, 1932, the life of the trust was extended for a period of five years from April 8, 1931. The said 25 shares constituted the sole corpus of the trust. All of the dividends received by the taxpayer as trustee during the year 1934, amounting to \$8,750.00, were paid to his wife, Helen Martin Wood.

On December 21, 1936, the Commissioner mailed to the aforesaid taxpayer a notice of deficiency for Federal income tax for the calendar year 1934, in the amount of \$1,228.23. In arriving at the deficiency in income tax of taxpayer for the year 1934, the Commissioner determined that the trust created by the taxpayer, by an instrument, in writing dated April 8, 1931, was a revocable trust, the income from the corpus of which was taxable wholly to the taxpayer under the provisions of Sections 166 and 167 of the Revenue Act of 1934, 48 Stat. 680 (U. S. C. Title 26, Sections 166 and 177).

On March 15, 1937, the taxpayer filed an appeal with the United States Board of Tax Appeals from the Commissioner's determination

of the deficiency as set forth in the notice of deficiency aforesaid, contending that the income from the trust, in the amount of \$8,750.00 received during the year 1934 constituted taxable income to his wife, Helen Martin Wood. The Commissioner filed his answer to the petition on May 8, 1937. The case came on for hearing before the Board on January 10, 1938. On June 17, 1938, the Board promulgated its opinion wherein it held that the trust so created did not provide for the distribution of any of the income therefrom to the grantor (taxpayer) and that none was so distributed; and that in neither the original trust instrument nor the supplemental trust instrument executed by the taxpayer was there reserved to him or anyone else any power of revocation. On August 18, 1938, it entered its final order of redetermination wherein and whereby it ordered and decided that there is a deficiency in income tax for the year 1934 in the amount of \$2.60.

III

Assignments of error

The Commissioner, being aggrieved by the conclusions of law contained in the decision of the United States Board of Tax Appeals and by its order redetermining a deficiency in income tax in the amount of \$2.60 for the calendar year 1934, desires to obtain a review by the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner's assignments of error are as follows:

(1) The Board erred in holding and deciding that the trust created by the taxpayer for the benefit of his wife, with himself as trustee, was not established to discharge a legal obligation of the grantor.

(2) The Board erred in holding and deciding that the trust created by the taxpayer for the benefit of his wife, with himself as trustee, was not revocable at any time during the period fixed for its duration and that the income from the trust was not under the control of the grantor or might be held or accumulated for future distribution of the grantor.

(3) The Board erred in holding and deciding that the income derived from the trust created by the taxpayer for the benefit of his wife, with himself as trustee, was not taxable to the grantor under the provisions of Section 166 or 167 of the Revenue Act of 1934 (48 Stat. 680, U. S. C. Title 26, Sections 166 and 167).

(4) The Board erred in holding and deciding that the income derived from the trust created by the taxpayer for the benefit of his wife, with himself as trustee, constituted taxable income to the beneficiary, Helen Martin Wood.

(5) The Board erred in entering its final order of redetermination that there is a deficiency of \$2.60 in the income tax due from the taxpayer for the year 1934.

(6) The Board erred in failing and refusing to enter a final order of redetermination that there is due from the taxpayer a deficiency in income tax for the year 1934 in the amount of \$1,228.23.

(7) The Board of Tax Appeals erred in that its decision is not supported by and is contrary to the evidence.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed by said Court.

(Signed) JAMES W. MORRIS,
Assistant Attorney General.

(Signed) J. P. WENCHEL,

R. L. W.

J. P. Wenchel,

Chief Counsel.

Bureau of Internal Revenue.

Of Counsel:

JOHN W. SMITH,

Special Attorney.

Bureau of Internal Revenue.

26 [Duly sworn to by John W. Smith; jurat omitted in printing.]

37 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Number 88426

Notice of filing petition for review

To MEREDITH WOOD, Esq.,

Underhill Road, Scarsdale, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 8th day of November 1938, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 8th day of November 1938.

(Signed) J. P. WENCHEL.

R. L. W.

J. P. Wenchel,

Chief Counsel.

Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 9th day of November 1938.

(Sgd.) MEREDITH WOOD,

Respondent on Review.

38 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. Number 88426

Notice of filing petition for review

To GEORGE M. WOLFSON, Esq.,

165 Broadway, New York, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 8th day of November 1938, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 8th day of November 1938.

(Signed) J. P. WENCHEL,

R. L. W.,

J. P. Wenchel,

Chief Counsel,

Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this — day of —, 1938.

Attorney for Respondent on Review.

39 Before United States Board of Tax Appeals

B. T. A. Number 88426

Affidavit of service

STATE OF NEW YORK,

County of New York, ss.:

Morris Heier, being first and duly sworn, says:

I am a citizen of the United States of America, over the age of twenty-one years and not a party to or in any way interested in the petition for review to the United States Circuit Court of Appeals for Second Circuit in the case entitled Guy T. Helvering, Commissioner of Internal Revenue, petitioner v. Meredith Wood, respondent, United States Board of Tax Appeals No. 88426.

That, on the 14th day of November 1938, I did personally serve a copy of the said petition for review and also a copy of notice of filing

petition for review on George M. Wolfson, 165 Broadway, New York, N. Y.

(Sgd.) MORRIS HEIER,
Internal Revenue Agent.

Subscribed and sworn to before me this 15th day of November 1938.

(Sgd.) R. D. DONOGHUE,
Internal Revenue Agent.

40

Before United States Board of Tax Appeals

Docket No. 88426

Stipulation of facts dated November 1, 1937

It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue and the petitioner, by their respective attorneys, that the following matters shall be taken as true upon the trial of the above-entitled proceeding without other or further proof, and that this stipulation may be received in evidence at the request of either party:

1. That Exhibit B attached to the petition herein is a true copy of the original Declaration of Trust, duly executed by petitioner on the 8th day of April 1931, and referred to in Paragraph IV (1) of the petition herein.

2. That Exhibit C attached to the petition herein is a true copy of the Supplementary Declaration of Trust, duly executed by petitioner on the 25th day of March 1932, and referred to in Paragraph IV (3) of said petition.

3. That after the 8th day of April 1931, and particularly during the year 1934, all dividends paid on the 25 shares of the capital stock of Book-of-the-Month Club, Inc., which constituted the corpus of the trust created by the aforementioned Declaration of Trust and Supplementary Declaration of Trust, were received by the petitioner as Trustee and deposited by him in a special bank account entitled "Meredith Wood, Trustee."

41 4. That all income received from said trust was paid to Helen Martin Wood, the beneficiary, by checks drawn to her order and signed by the petitioner as Trustee.

5. That all of the said dividend received by petitioner as such Trustee during the year 1934, amounting to \$8,750, were included in the income-tax return filed by said Helen Martin Wood for the year 1934.

6. That petitioner has duly paid the tax shown to be due on his income-tax return for the year 1934, as filed, in the sum of \$1,278.96.

7. That petitioner heretofore had a hearing with respect to his 1934 income taxes before C. B. Allen, Esq., Internal Revenue Agent in Charge, 341 Ninth Avenue, New York, N. Y., on August 17, 1936, and has heretofore filed a protest with respect thereto with said Internal

Revenue Agent in Charge, as well as with the Commissioner of Internal Revenue at Washington, D. C.

Dated November 1, 1937.

(Sgd.) GEORGE M. WOLFSON,
 (Sgd.) RALPH A. MCCLELLAND,
 George M. Wolfson,
 Ralph A. McClelland,

Attorneys for Petitioners

(Sgd.) J. P. WENCHEL,

Chief Counsel,

Bureau of Internal Revenue.

42 *Exhibit B, annexed to stipulation of facts dated November 1, 1937*

DECLARATION OF TRUST

The undersigned, Meredith Wood, of Scarsdale, New York, herein-after called the "Settlor," does hereby acknowledge and declare that he is the owner of twenty-five shares of the capital stock of Book-of-the-Month Club, Inc., a New York corporation, and that he now holds and will continue to hold the same in trust, to hold, invest and reinvest the same, to collect the net income therefrom from the date hereof and to pay the said net income, as and when received by him, to his wife, Helen Martin Wood, until the termination of this trust.

This trust shall continue in effect until (a) the expiration of three years from the date of this instrument, or (b) the death of the Settlor, or (c) the death of Helen Martin Wood, whichever event shall first happen, and shall thereupon terminate.

On the termination of the trust by reason of the expiration of said three years or the death of Helen Martin Wood, all property then held in trust hereunder shall be paid, delivered and transferred to the Settlor, to be his own property free of trust. On the termination of the trust by reason of the death of the Settlor, the said trust property shall be paid, delivered and transferred to the executors of the Settlor to be disposed of as part of his estate under his Last Will and Testament.

Any trustee hereunder, whether the Settlor or a substituted trustee, shall have full right and power without liability for loss:

(a) to retain as a trust investment under this instrument the
 43 said twenty-five shares of the capital stock of Book-of-the-Month Club, Inc., or to sell the same, or any part thereof, at such time and on such terms as the trustee shall deem proper;

(b) to make from time to time any investment or reinvestment of any of the property or moneys held in trust hereunder, without regard to whether such investment or reinvestment is such an investment or reinvestment as trustees are authorized by law to make or retain in the absence of direction in the trust indenture;

(c) for all purposes of the trust, to fix and determine the value of the property held thereunder and of all parts thereof;

(d) to determine whether any property or money received or held in trust shall be treated as capital or income, and the mode in which any expense incidental to the execution of the trust is to be borne as between capital and income, provided, however, that all dividends payable in stock and all rights to subscribe to stock shall be treated as principal.

The trustee, whether the Settlor or a substituted trustee, shall not be held liable for any loss to or diminution of the trust fund not arising from wilful misconduct. While the Settlor is trustee hereunder, no commissions shall be received by him either with respect to principal or income.

The Settlor shall have the right at any time to resign as trustee hereunder for any reason which he shall personally deem sufficient. Such resignation shall be effected by delivering or mailing written notice thereof to Helen Martin Wood. The Settlor shall have power in such case to appoint a substituted trustee by delivering to the person or corporation so appointed a written notification thereof, and by delivering a copy of such notification to Helen Martin Wood.

Anything herein elsewhere contained to the contrary notwithstanding, the trustee, whether the Settlor or a substituted trustee, shall at all times hold and dispose of said twenty-five shares of the capital stock of Book-of-the-Month Club, Inc., subject to the provisions and restrictions of a certain agreement in writing made and dated the 27th day of January, 1931, between Harry Scherman and the Settlor, to the same extent as regards said agreement, as though said stock were held and owned by the Settlor as an individual; and on the death of the Settlor said stock shall be held and disposed of by his executors as provided in said agreement; and if the Settlor shall during his life again become the beneficial owner of said stock by termination of this trust, he shall hold and dispose of the same as provided in said agreement.

In witness whereof, the Settlor has executed this Declaration of Trust, in duplicate, this 8th day of April, 1931, one of said duplicates being retained by the Settlor and the other delivered to Helen Martin Wood.

STATE OF NEW YORK.

(Sgd.) MEREDITH WOOD. [L. S.]

County of New York, ss:

On this 8th day of April 1931 before me personally came Meredith Wood, to me known to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

[SEAL]

(Sgd.) AUGUSTE M. THIERY,
Auguste M. Thiery,

Notary Public, New York County.

Clerk's No. 46; Register's No. 2T63. Commission expires March 30, 1932.

The undersigned, Harry Scherman, a party to the agreement dated January 27, 1931, referred to in the foregoing instrument, hereby consents that said instrument be executed and delivered.

April 8, 1931.

(Sgd.) HARRY SCHERMAN.

46 *Exhibit C*, annexed to stipulation of facts dated November 1, 1937

SUPPLEMENTARY DECLARATION OF TRUST

Whereas the undersigned, Meredith Wood, of Scarsdale, New York, hereinafter called the "Settlor," did by a written Declaration of Trust dated April 8, 1931, declare himself the Trustee of twenty-five shares of the capital stock of Book-of-the-Month Club, Inc., a New York corporation, for the benefit of the persons and upon the terms and conditions mentioned in said Declaration of Trust; and

Whereas the said Declaration of Trust contains the following provision:

"This trust shall continue in effect until (a) the expiration of three years from the date of this instrument, or (b) the death of the Settlor, or (c) the death of Helen Martin Wood, whichever event shall first happen, and shall thereupon terminate,"

Now, therefore, the Settlor does hereby acknowledge and declare that he holds and will continue to hold said twenty-five shares of the capital stock of the Book-of-the-Month Club, Inc., in trust, to hold, invest, and reinvest the same, to collect the net income therefrom and to pay the said net income as and when received by him to his wife, Helen Martin Wood, until the time fixed by this instrument for the termination of this trust. This trust shall continue in effect until (a) the expiration of five years from April 8, 1931, or (b) the death of the Settlor, or (c) the death of Helen Martin Wood, whichever event shall first happen, and shall thereupon terminate.

47 On the termination of the trust by reason of the expiration of said five years or the death of Helen Martin Wood, all property then held in trust hereunder shall be paid, delivered and transferred to the Settlor, to be his own property free of trust. On the termination of the trust by reason of the death of the Settlor, the said trust property shall be paid, delivered, and transferred to the executors of the Settlor to be disposed of as part of his estate under his Last Will and Testament.

Any trustee hereunder, whether the Settlor or a substituted trustee, shall have all the rights and powers that are given to the trustee or any substituted trustee by the said Declaration of Trust dated April 8, 1931, and all of the provisions of said Declaration of Trust, except as herein modified, shall apply to and govern the trust created by this instrument.

In witness whereof, the Settlor has executed this Declaration of Trust in duplicate this 25th day of March 1932, one of said dupli-

ates being retained by the Settlor and the other delivered to Helen Martin Wood.

(Sgd.) MEREDITH WOOD. [L. s.]

48 STATE OF NEW YORK,

County of New York, ss:

On this 25th day of March 1932, before me personally came Meredith Wood, to me known to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

[NOTARIAL SEAL]

(Sgd.) SYLVIA WOLLENBERG,

Notary Public.

New York Co. Clk's No. 494. Bronx Co. Clk's No. 128. Term expires March 30, 1932.

The undersigned, Harry Scherman, a party to the agreement dated January 27, 1931, referred to in Declaration of Trust dated April 8, 1931, hereby consents to the execution and delivery of this instrument. March 25, 1932:

(Sgd.) HARRY SCHERMAN.

49

Before United States Board of Tax Appeals

Docket No. 88,426

Stipulation of facts dated February 21, 1938

It is hereby stipulated and agreed between the Petitioner and the Respondent, by their respective attorneys:

1. That the copy agreement dated the 27th day of January 1931, between Harry Scherman and Meredith Wood, annexed as Exhibit 1 to Petitioner's motion for leave to introduce additional evidence herein, dated February 7, 1938, is a full, true and correct copy of the original of said agreement, and of the whole thereof, and that the copy agreement dated the 27th day of January 1931, between Robert K. Haas and Merle S. Haas and Harry Scherman and Bernardine K. Scherman and Meredith Wood, annexed as Exhibit 2 to said motion, is a full, true and correct copy of the original of said agreement, and of the whole thereof.

2. That if Petitioner's said motion of February 7, 1938, be granted, the copies of said agreements attached to said motion shall be, and be deemed to have been, received in evidence herein with the same force and effect as if the originals thereof had been received in evidence at the hearing herein held on the 10th day of January 1938.

Dated: February 21, 1938.

(Sgd.) GEORGE M. WOLFSON,

George M. Wolfson,

Attorney for Petitioner.

(Sgd.) J. P. WENSCH,

Chief Counsel,

Bureau of Internal Revenue.

50 *Exhibit 1, annexed to stipulation of facts dated February 21, 1938*

Memorandum of agreement made the 27th day of January 1931, between Harry Scherman of the Borough of Manhattan, City of New York, party of the first part, hereinafter called "Scherman," and Meredith Wood of Scarsdale, New York, party of the second part, hereinafter called "Wood."

Whereas, the parties hereto, together with Robert K. Haas, Merle S. Haas, and Bernardine K. Scherman, entered into an agreement dated July 18, 1929, containing among other things certain restrictions upon the disposition by Wood of his holdings of shares of stock of Book-of-the-Month Club, Inc.; and

Whereas, the parties to said agreement are about to terminate and cancel the same simultaneously with the execution hereof;

Now, therefore, in order to induce the parties to said agreement of July 18, 1929, to cancel the same, and in consideration thereof, the parties hereto agree as follows:

1. If and whenever Wood shall desire to dispose of all or any part of the stock of Book-of-the-Month Club, Inc., which he may now or hereafter own, he will in each case first offer to sell the same to Scherman at the price and upon the terms which shall be stated in said offer. Each such offer shall remain open for thirty days, and at the expiration thereof Wood shall have the right to sell to any person, firm or corporation whatsoever so much of said stock as shall not be purchased by Scherman, provided (a) that such sale shall not be made at a lower price or on terms more favorable to the
51 buyer than those contained in said offer; (b) that the number of shares so sold shall not be smaller than that so offered and unpurchased and (c) that such sale shall be made and the consideration therefor delivered within three months after the latest date for acceptance of said offer by Scherman. In the event that such sale to others is not so made within said period of three months, the stock so offered for sale shall again become subject to the terms of this agreement.

2. In case of Wood's death, his executors or personal representatives shall within ninety days after their qualification offer all of the stock of said company held by Wood at the time of his death for sale to Scherman, subject to acceptance within thirty days from the date of the offer, at its fair value as at the time of Wood's death. The said offer may be accepted as to all or part of the stock so offered. If the personal representatives of Wood and the offeree cannot agree upon the fair value of said stock, the same shall be determined by three arbitrators, one appointed by each of the parties, and a third chosen by the two so appointed, the decision of the majority of the arbitrators to be conclusive upon all parties. In case of the appointment of arbitrators, the time within which the offer may be accepted shall be reasonably extended so as to allow for their determination.

In the event that any stock so offered shall not be purchased, the personal representatives of Wood shall be free to sell the same without restrictions of any kind.

If the two arbitrators appointed by the parties shall be unable to agree upon a third arbitrator, then the President for the time being of Central Hanover Bank & Trust Company shall act as such third arbitrator, or if he shall be unwilling so to do, shall appoint such third arbitrator.

52 3. Certificates for all stock of said company issued to Wood shall bear a suitable legend thereon containing a reference to this agreement.

4. Wood agrees not to pledge, mortgage, hypothecate, or otherwise encumber any of the shares of said company held by him without the consent of Scherman.

5. All notices, orders, requests, and communications provided for in this agreement shall be in writing and shall be deemed to have been duly given when delivered to the party entitled to receive the same or when mailed by registered mail to said party addressed to him at his last known place of residence.

6. All rights herein granted to Scherman shall enure to the benefit of his executors or personal representatives, and in all other respects except where the context otherwise requires the provisions of this agreement shall bind and benefit the executors and personal representatives of the parties hereto. This agreement is not assignable.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

HARRY SCHERMAN. [L.S.]

MEREDITH WOOD. [L.S.]

JANUARY 27, 1931.

53 Book-of-the-Month Club, Inc., hereby approves the foregoing agreement and acknowledges receipt of a copy thereof.

BOOK-OF-THE-MONTH CLUB, INC.,

By HARRY SCHERMAN, *President*.

Attest:

EDITH WALKER, *Secretary*.

STATE OF NEW YORK.

County of New York, ss.:

On this 27th day of January 1931, before me personally came Harry Scherman, to me known and known to me to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

[NOTARIAL SEAL]

RAYMOND E. COOK.

Notary Public, Queens County.

Clerk's No. 333; Register's No. 389; Certificate filed in New York County, New York County Clerk's No. 20; New York County Register's No. 2C4, Commission expires March 30, 1932.

54 STATE OF NEW YORK.

County of New York, ss.:

On this 27th day of January 1931, before me personally came Meredith Wood, to me known and known to me to be the person described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

[NOTARIAL SEAL]

RAYMOND E. COOK,
Notary Public, Queens County.

Clerk's No. 333; Register's No. 389, Certificate filed in New York County, New York County Clerk's No. 20, New York County Register's No. 2C4, Commission expires March 30, 1932.

55 *Exhibit 2, annexed to stipulation of facts dated February 21, 1938*

Memorandum of agreement made the 27th day of January 1931, between Robert K. Haas of Scarsdale, New York, party of the first part, and Merle S. Haas, his wife, of the same place, party of the second part, and Harry Scherman of the Borough of Manhattan, City of New York, party of the third part, and Bernardine K. Scherman, his wife, of the Borough of Manhattan, City of New York, party of the fourth part, and Meredith Wood of Scarsdale, New York, party of the fifth part.

Whereas, the first four parties hereto under date of July 31, 1928, made an agreement restricting the disposition of their holdings of shares of stock of Book-of-the-Month Club, Inc., a New York corporation, and under date of July 18, 1929, an agreement was made between all of the parties hereto modifying in certain respects said agreement of July 31, 1928; and

Whereas, by consent of all of the parties hereto Harry Scherman has acquired or is about to acquire all of the holdings of stock of said corporation of Robert K. Haas and Merle S. Haas;

Now, therefore, in consideration of the premises and of the covenants hereinafter contained, the parties hereto agree as follows:

The aforesaid agreement of July 31, 1928, and the aforesaid modifying agreement of July 18, 1929, and all other agreements between the parties hereto with respect to the disposition of their respective holdings of stock of Book-of-the-Month Club, Inc. (excepting
56 an agreement executed simultaneously herewith between Harry Scherman and Meredith Wood) are hereby terminated and cancelled as of this date.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

BERNARDINE K. SCHERMAN. [L. S.]

MERLE S. HAAS. [L. S.]

ROBERT K. HAAS. [L. S.]

HARRY SCHERMAN. [L. S.]

MEREDITH WOOD. [L. S.]

57 In United States Circuit Court of Appeals for the Second Circuit

B. T. A. No. 88426

Praeceptum for record

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of all proceedings before the Board.
2. Pleadings before the Board.
 - (a) Petition including annexed copy of deficiency letter.
 - (b) Answer.
 - (c) Motion for leave to introduce additional evidence.
3. Findings of fact, opinion and decision of the Board.
4. Petition for review, together with proof of service of notice of filing petition for review and service of a copy of petition for review.
- 58 5. Stipulation of facts filed January 10, 1938, with exhibits B and C attached to the petition.
6. Stipulation of additional facts filed March 4, 1938, with exhibits 1 and 2 attached to motion for leave to introduce additional evidence.
7. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.
8. This praecipe.

(Sgd.) J. P. WENCHEL.

J. P. Wencel,

Chief Counsel,

Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 18th day of January 1939. Agreed to:

(Sgd.) GEORGE M. WOLFSON,

Attorney for the Respondent.

JWS mtr.

59 [Clerk's certificate to foregoing transcript omitted in printing.]

60 In United States Circuit Court of Appeals for the Second
Circuit

No. 310—October Term 1938

Argued May 3, 1939. Decided May 29, 1939

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MEREDITH WOOD, RESPONDENT

Appeal from the Board of Tax Appeals

Before L. HAND, CHASE, and PATTERSON, *Circuit Judges*

On petition to review the decision of the United States Board of
Tax Appeals.

L. W. Post, Sp. Asst. to Atty. Gen., for petitioner.

George M. Wolfson, of New York City, for respondent.

Opinion

PER CURIAM.

Order affirmed on authority of United States v. First National Bank
of Birmingham, 5 Cir., 74 F. (2d) 360.

61 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MEREDITH WOOD, RESPONDENT

Judgment

Filed June 16, 1939

Appeal from the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of record from the
United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and
decreed that the order of said United States Board of Tax Appeals
be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in
accordance with this decree.

ing.]

WM. PARKIN, *Clerk*.

62 [File endorsement omitted.]

63 [Clerk's certificate to foregoing transcript omitted in printing.]

64 Supreme Court of the United States

Order allowing certiorari

Filed November 6, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

[Endorsement on cover:] File No. 43791. U. S. Circuit Court of Appeals, Second Circuit. Term No. 384. Guy T. Helvering, Commissioner of Internal Revenue, Petitioner vs. Meredith Wood. Petition for a writ of certiorari and exhibit thereto. Filed September 13, 1939. Term No. 384 O. T. 1939.

MICRO CARD

TRADE

MARK



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